United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

75 7540

OCT 16 1978

HARVEY S. KORNIT,
APPELLANT,

V.

BOARD OF EDUCATION
PLAINVIEW-OLD BETHPAGE
SCHOOL DISTRICT
PLAINVIEW, NEW YORK,
APPELLEE.

DOCKET NO. 75-7540

NOTICE OF PETITION
FOR REHEARING

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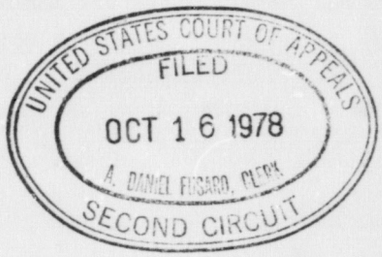

TO: CAMPANELLA, ZOLOTOROFE & GUERCIO, ESQS.

PLEASE TAKE NOTICE that a Petition for Rehearing will be submitted this date to the United States Court of Appeals for the Second Circuit at the United States Courthouse, Foley Square, New York, New York, on behalf of the appellant pro se, Harvey S. Kornit in the above-captioned action in response to the decision of the Court dated October 4, 1978.

Dated: October 16, 1978

Harvey S. Kornit
HARVEY S. KORNIT
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UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARVEY S. KORNIT,
PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION
PLAINVIEW-OLD BETHPAGE
SCHOOL DISTRICT
PLAINVIEW, NEW YORK,
RESPONDENT-APPELLEE.

DOCKET NO. 75-7540
DECISION AND ORDER
ON REMAND
OCTOBER 4, 1978

PETITION FOR REHEARING

The petitioner, Harvey S. Kornit, the appellant pro se in the above-captioned action, hereby submits this petition in response to the Decision and Order handed down by the Court of Appeals for the Second Circuit on October 4, 1978, as per Rule 40 of the Federal Rules of Appellate Procedure.

The Order of this Court was as follows:

> "ORDERED, that the judgment of this court of September 15, 1976, be and it hereby is vacated; and it is
>
> "FURTHER ORDERED, that the judgment of the district court dismissing the complaint be and it hereby is affirmed, substantially for the reasons stated by the late Judge Orrin G. Judd, beginning at page 5, paragraph 4 of his Memorandum and Order dated July 22, 1975. The school officials involved did not have a sufficient pecuniary interest to disqualify them. See Hortonville Joint School District No. 1, et al v. Hortonville Education Assn., et al., 426 U.S. 482, 491-92 (1976). The procedure provided by N.Y. Civil Service Law §210 does not amount to a garnishment without hearing or court order in violation of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)."

ARGUMENT

The appellant has contended that the Taylor Law penalty provisions (New York Civil Service Law §210) place persons with a vested and substantial pecuniary interest into positions of adjudication in which they will make determinations of guilt or innocence and upon which determination they will make substantial and illegal garnishments of earned wages for work performed, both actions in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. It is clear from innumerable court decisions that the principle of the separation of executive power and responsibility and legislative power and function from the judiciary must be maintained if justice is to prevail and society is to stay free. In Village of Monroville, Appellee v. Ward, Appellant,(56 OO(2d) 110,or 27 OS(2d) 179, decided July 14, 1971, Justice Corrigan, in his dissenting opinion (in favor of Ward), stated the following in support of that principle, quoting from the appellant Ward's brief:

> " The scrupulous concern in American jurisprudence for the impartiality of its judges has its origins in two much venerated principles of government.
>
> " The maxim that no man ought to be a judge in his his own cause ('Nemo debit esse judex in propria causa') was rigidly applied at common law. (Footnote omitted). Indeed, some courts went so far as to disqualify a judge merely because he was an inhabitant of the town which would receive part of the fine should the accused be convicted. See e.g. Pearce v. Atwood, 13 Mass. 324 (1816). (Footnote omitted).
>
> " The second principle generating concern for the avoidance of conflicts of interest on the part of

> the judiciary was the doctrine of separation of powers, by which the framers of the Constitution endeavored to protect individual libert by the distribution of power among the several branches of government. Thus Alexander Hamilton declared in No. 78 of the Federalist Papers:
>
> " ' * * * the general liberty of the people can never be endangered from (the judiciary); I mean so long as the judiciary remains truly distinct from both the legislative and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers.' "

The New York State Taylor Law Amendments of 1969 vest in a Superintendent of Schools powers to adjudicate matters which are in direct conflict with his executive functions. Among the direct responsibilities, if not the foremost, is that a Superintendent of Schools seek sources of revenue and balance the school district budget. In his adjudication capacity, upon determinations of guilt of individuals alleged to have participated in a work stoppage, the Superintendent thereby authorizes the School District Assistant Superintendent for Business to make garnishment of earned wages for work performed, in conformity with the deductions required under the Taylor Law penalty provisions. This income, or as the Plainview-Old Bethpage School District handled the matter by the non-payment of the true gross wages earned so that teachers and clerks affected worked for four days with no pay credited from which the penalty (and taxes) would be deducted, was, of course, calculated into the budget. In essence the school district saved a portion of its budget, and probably an amount sufficient to balance the budget. Therein lies the conflict of interest. The right of an individual to Constitutional Due Process is an absolute. Constitutional Due Process is not served by the Taylor Law.

The Taylor Law penalty provisions thus allow persons with a major and substantial indirect pecuniary interest to adjudicate matters from which the penalties imposed are of primary concern in their executive capacity, namely the balancing of the school district budget. The net effect is that monies which might have been raised by taxation are obtained through a judicial process. It has never been the function of the judiciary in our free society to perform legislative and executive functions, nor should it be the function of the legislative or executive branchs of government to perform what are obviously judicial functions. The Superintendent of Schools, who has the obligation under his executive authority to balance a budget and compensate individuals for their labor service, should not be in a position of adjudication which will result simultaneously in deductions from the compensation of employees of monies in the payment of penalties which will be directly used for budget balancing purposes. These two functions of the Superintendent of Schools are on their face incompatible.

There are three factors which require an impartial adjudication in jurisprudence. Two of these factors are obvious. The first factor is that simple logic tells us that someone in a position of adjudication should not have a bias in the matter to be adjudicated, such as one in which there is a financial benefit only in the determination of guilt, whether it be personal and direct, personal and indirect,or indirect, as a number of United States Supreme Courts indicate. The second factor is that, even when an appeal is available, a biased adjudication taints and prejudices the appeal itself. Therein lies the principle of Ward v. Village of Monroeville, (409 U.S. 57 (1972):

> " (4) Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance. (Footnote omitted) Accordingly, the judgment of the Supreme Court of Ohio is reversed and the case is remanded for further proceedings not inconsistent with this opinion."

However, not in any manner to diminish the importance of the first two factors which require an impartial adjudication in the first instance, the petitioner wishes to direct the Court's attention to a third factor, not any less important, which requires an impartial adjudicator in the first instance. If an adjudicator has a vested interest in the outcome of his adjudication is it not also possible that in his executive capacity he can help to shape the events which occur prior to the adjudication, and which result in the adjudication? Is it not also possible that events can be shaped because one party knows in advance that he will be the adjudicator rather than another third party? It is this appellant's contention that the mere fact that the Superintendent of Schools will be in a position of adjudication under the Taylor Law penalty provisions directly affects his position in the collective bargaining between the school district and the employee bargaining agents, and is prejudicial to good faith collective bargaining. Since the Superintendent knows in advance that he will be the adjudicator

and what fines he can impose, his posture to compromise reasonably is altered, and is more likely to cause an opposite attitude. Thus the penalty provisions of the Taylor Law by allowing this adjudication by the Superintendent of Schools corrupt the collective bargaining process. The Superintendent of Schools has a pecuniary interst in the collective bargaining process as is his executive function in balancing the budget. This pecuniary interest is not diminished when he steps into his role as adjudicator, and thereby lies a misuse of the judicial power. A judicial process must be free of a conflict of interest, but it must not be used, as well, so that, in effect, directly or indirectly, it creates or nourished events which will lead to matters before it.

It is no accident that one finds a Superintendent of Schools, with his major responsibilities for the preparation of the budget, invested by the Taylor Law penalty provisions in this position of adjudication, just as it was not accidental that mayors in Tumey v. Ohio (273 U.S. 510 (1927) and Ward v. Village of Monroeville, supra, performed their judicial functions. The local instrumentality welcomed those state laws in Ohio just as a school district within New York welcomed the Taylor Law penalty provisions. Why should villages in Ohio be concerned with the enforcement of state laws? Why should a Superintendent of Schools be concerned with the enforcement of state laws concerning individuals alleged to have been on strike? Did the State of Ohio reimburse the mayors for their services in criminal adjudication? Did the mayors expect to be reimbursed? Is a Superintendent of Schools reimbursed for his services as an adjudicator by the State of New York or does he

expect reimbursement? Was the adjudication of alleged violations of the law the only primary consideration? Let us examine the facts.

In Tumey v. Ohio, supra we read the following at 520-1:

> " By an act of 1913 (103 O.L. 290) the mayor's court in villages in Hamilton County, and in half a dozen other counties with large cities, was deprived of jurisdiction to hear and punish misdemeanors committed in the county beyond the limits of the corporation. The Prohibition Act, known as the Crabbe Act, adopted in 1920 (108 O.L. Pt 1, 388 and Pt. 2, 1182) changed this,and gave to the Mayor of every village in the State jurisdiction within the county in which it was situate to try violations of that act.
>
> "Counsel for the State in their brief explain the vesting by state legislatures of this country of jurisdiction in village courts as follows: "The purpose of extending jurisdiction in the first instance was to break up places of outlawry that were located on the municipal boundary just outside of the city. The Legislature also faced the situation that in some of the cities, the law enforcement agencies were failing to perform their duty, and, therefore, in order that those forces that believe in enforcement and upholding of law might have some courts through which process could be had, it gave to mayors county-wide jurisdiction." It was further pointed out in argument that the system by which fines to be collected were to be divided between the State and the village was for the proper purpose of stimulating the activities of the village officers to such due enforcement."

At this point in the Tumey decision it is interesting to note that only in argument before the Court, and not earlier in a brief, did the attorney admit to the financial arrangement between the state and the village. Let us continue and examine how devoted the Mayor was to be part of "those forces that believe in enforcement and upholding of law". The Tumey Opinion continues at 521 as follows:

> " The Village of North College Hill in Hamilton County, Ohio, is shown by the federal census to have a population of 1104. That of Hamilton County, including the City of Cincinnati, is more than half a million. The evidence discloses that Mayor Pugh came to office

> after ordinance No. 125 was adopted, and that there was a division of public sentiment in the village as to whether the ordinance should continue in effect. A petition opposing it and signed by a majority of the voters was presented to Mayor Pugh. To this the Mayor answered with the declaration that, if the village was in need of finances, he was in favor of and would carry on "the Liquor Court" as it was popularly called, but that if the court was not needed for village financial reasons,he would not do so. It appears that substantial sums were expended out of the village treasury, from the fund made up of the fines thus collected, for village improvements and repairs. The Mayor was the owner of a house in the village." (Italics added).

Admitedly, "the Liquor Court" owed its very existence to the pecuniary interest of the village in the eyes of the mayor, as well as his own fees and those of other employees.

Let us now examine Ward v. Monroeville, supra, to find out the devotion to "law and order" for its own sake on the part of the mayor and village in that case. The mayor in this village received no direct and personal fee, but fines against persons were placed directly into the village treasury. The fines imposed against persons found guilty of those violations brought before the mayor's court were a substantial part of the revenue of the Village of Monroeville, Ohio, and one of the mayor's functions was the responsibility for village finances. In 1959 when state legislation threatened the loss of the income from the mayor's court, the following ordinance was passed in the village.

> "Ordinance No. 59-9:
>
> "WHEREAS, the legislation know as the County Court law passed by the 102nd General Assembly greatly reduces the jurisdictional powers of Mayor Courts as of January 1, 1960; and
>
> "WHEREAS, such restriction may place a hardship upon law enforcement personnel in this village and sur-

rounding areas as to endanger the health, welfare and safety of person residing or being in our village; and

"WHEREAS, other such provisions of this legislation may cause such a reduction in revenue to this village that an additional burden may result from increased taxation and/or curtailment of services essential to the health, welfare and safety of this village;

"BE IT ORDAINED BY THE VILLAGE OF (MONROEVILLE) OHIO:

" Section 1. That the services of the management consulting firm of Midwest Consultants, Incorporated of Sandusky, Ohio, be employed to conduct a survey and study to ascertain the extent of the effects of the County Court Law on law enforcement and loss of revenue in and to the Village of (Monroeville), Ohio, so that said Village can prepare for the future operations of the Village to safeguard the health, welfare and safety of its citizens ..." (Italics added).

In this instance we are made aware that the Mayor's Court exists not only to serve justice, as is emphasized enough times in obvious psychological Shakespearean fashion ..."health, welfare and safety", but to compensate for increased taxes. The indirect pecuniary interest of the mayor is apparent and clear.

Let us now turn our attention to the New York State Taylor penalty provisions, and make a comparison with the adjudication under those provisions and the adjudication in Tumey, supra and in Ward v. Monroeville, supra. In the Ohio cases even though there was enforcement of state laws regarding alcoholic beverage control and state highway driving offenses, there was no reimbursement by the State of Ohio for the adjudication services rendered, nor did the villages involved expect any reimbursement. As a matter of fact the State of Ohio had a pecuniary interest in furnishing

the amount of $500 to set up the mayor's court in Tumey, supra, since the State would get half of the total amount of the fines collected. There was no need for reimbursement to the village since all parties understood clearly the financial benefits of the Craboe Act "liquor courts". The villages of Monroeville and North College Hill were quite content to use the judicial process as a means of raising revenue in lieu of taxation, and in the case of the latter village, despite the fact that a majority of the townspeople were opposed to the operation of the court, the mayor's court continued to operate.

Under the Taylor Law penalty provisions there are no provisions for the reimbursement of expenses incurred in the adjudication process as the hiring of hearing officers. The New York State Legislature did not provide such reimbursements and school districts have not, to the best of petitioner's knowledge, requested such compensation. The reason is simple and obvious. There is such an overwhelming pecuniary gain in such administrative proceedings that additional compensation by the State of New York would border on the ludicrous. Justice is performed by computer entries.

The petitioner contends that Gibson v. Berryhill, (411 U.S. 564 (1973), is applicable to the current action since it extends the requirements of constitutional due process as indicated in the principle of Tumey, supra, and Ward v. Monroeville, supra, in regard to the disqualification of an adjudicator with a pecuniary interest, whether personal and direct.... or indirect, to administrative action, and, in addition, to the principle of Ward v. Monroeville, supra, which indicates that disqualification is not ex-

excused by the fact that a review or appeal de novo is available after administrative proceedings.

The question as to whether Gibson v. Berryhill, supra, applies only to personal pecuniary interest may be academic in light of the United States Supreme Court decision of June 6,1978 in Monell v. Department of Social Services of the City of New York, (436 U.S. (1978) since a school district (or a Board of Education) is considered as a person for purposes of 42 U.S.C. 1983. If the school district has gained financially from the administrative proceedings and has had a pecuniary interest therein, then there has been a personal pecuniary interest. One need not apply the indirect pecuniary interest of the Superintendent of Schools in making determinations because of his responsibility in balancing the school district budget and seeking revenues thereto. The school district is the person and it has a personal pecuniary interest in the administrative proceedings held in its name by one of its officials. The pecuniary interest is therefore direct and personal.

The financial benefits to the school district in its administrative proceedings under the Taylor Law penalty provisions are obvious and substantial. In the current action hundreds of thousands of dollars were involved, and in similar situations in New York State, millions of dollars have been involved. The huge sums of money alone would require that these matters be handled directly by courts and certainly not by administrative action of a governmental instrumentality which has a vested interest. Constitutional due process is not served under the Taylor Law. The

judicial function of a school district under the Taylor Law penalty provisions makes a mockery of the principle of the separation of the judicial function in government from the executive and legislative.

Hortonville Joint School District No. 1 v. Hortonville Education Assn, (426 U.S. 482 (1976) is not applicable to the current action. In Hortonville, the respondent attempted to indicate that there was a pecuniary interest on the part of the school district since, by the discharge of higher paid teachers who were engaging in a work action, the school district could hire new and less experienced teachers at lower salaries. Although this petitioner did not agree with the majority opinion in that instance on all grounds, there was an entirely different situation present than in the current action. In Hortonville, the question was whether the state law indicated that a tenured teacher could be summarily dismissed by his own Board of Education or whether hearings had to be held before another panel. The United States Supreme Court decided that the Board of Education had that power in that action. The current action is quite different. The matter before the court in this instance is whether one can be deprived of property, namely earned wages for services performed, by a party with an obvious and substantial pecuniary interest through adjudication and garnishment procedures which are clearly in violation of Constitutional due process as defined by federal and New York State court decisions and in violation of the limitations of the Federal Wage Garnishment Law. The current action is akin to Ward v. Monroeville.

The Taylor Law penalty provisions, as this petitioner has pointed out, corrupt the process of collective bargaining by offer-

ing a temptation or reward not to resolve the issues presented in the collective bargaining fairly and earnestly, so that otherwise reasonable employees might be forced to seek an improvement in their wages and work conditions through a work stoppage, which can be of enormous financial benefit through self-adjudication under the Taylor Law penalty provisions to the school district. The Taylor Law penalty provisions probably do more to cause work actions because of its corruption of the bargaining process than may be apparent at first glance of the law. The penalty provisions take advantage of the human desire for self-respect and self-improvement and, in addition, the financial aims of a school district, so that a collision may be inevitable when the school district realizes that all of its financial problems can be solved, not through good management and reasonableness in negotiations, but by tempting a work action so that it can reap the benefits of the two-for-one penalty upon adjudication through administrative proceedings.

Obviously the New York State Legislature suspected that government instrumentalities might not be completely devoted to the cause of fair cllective bargaining with employee bargaining agents when in 1974 it amended the Taylor Law requiring that government bodies go to binding arbitration if an impasse is reached in negotiations with policemen and firemen. The cities of Amsterdam and Buffalo objected to this requirement as being in violation of the one man-one vote rule and brought suit which was decided by the New York State Court of Appeals on June 5, 1975. (City of Amsterdam, Respondent, v. Robert D. Helsby et al., Constituting the Public

Employment Relations Board of the State of New York, et al., Appellants, which was combined with City of Buffalo, Appellant, v. New York State Employment Relations Board et al., Respondents. (37 NY2d 19 (1975). In its opinion, the Court of Appeals decided that, since the amendment was binding on all instrumentalities that employed policemen and firemen, the amendment was a general law and therefore constitutional. That amendment is still in affect today. Thus, even though policemen and firemen are subject to the same financial penalties as the two-for-one penalties and possible court-imposed incarceration and financial penalties if they engage in a work stoppage as are other civil service employees, the procedural step of mandatory binding arbitration virtually eliminates the need or the possibility that policemen or firemen would be placed in the position of having to resort to a situation which would cause the imposition of these drastic penalties. This petitioner knows of only one situation in which the arbitrator's award was unsatisfactory to the policemen so that there was a work action. Even though teachers and other civil servants are faced with the same eventual penalties as are policemen and firemen, they do not have the protection of this procedural step which is more than just a procedural step. The mandatory binding arbitration in essence has changed the Taylor Law into two special laws and the Taylor Law therefore is not equally enforced in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is unconstitutional if government employees, subject to the same law and to the same penalties in the name of "the health, safety and welfare" of the residents of New York State, are treated differently. The "procedural step" of compulsory binding

arbitration <u>in actual practice</u> does away with the two-for one financial penalty and other penalties in regard to policemen and firemen. The State of New York cannot, under the Federal Constitution, assert that policemen and firemen perform a more vital service than other employees of the government while maintaining the cruel and harsh two-for-one penalty and other possible penalties for all other employees without giving them the equal protection of the compulsory binding arbitration amendment which in affect would give them equal protection under the Fourteenth Amendment. If the services of correction officers, teachers and clerks are not really vital to the operation of the government then they should not be subjected to penalties which although "on the books" are not necesary to apply to policemen and firemen. The petitioner has not presented his views regarding the 1974 Amendment to the Taylor Law in earlier court papers since the question of equal enforcement of the law was not applicable to the current situation under court review which occurred in 1972. The matter is presented at this time because the petitioner is well aware of the Court's concern for law and order and safety. New York State, by its compulsory binding arbitration amendment to the Taylor Law, has greatly solved that problem. After the Amendment of 1974 was in effect, the New York Legislature in June of 1975 took up the matter of the two-for-one penalty. Decent people voting in the majority 114-20 in the Assembly decided to eliminate the two-for-one penalty and the administrative proceedings required for its implementation. However, the bill, submitted by 17 Senators was tabled in committee. Politically

speaking, the matter died in committee, but the matter of the Taylor Law penalty provisions is quite alive in its overt repugnance to human dignity and the United States Constitution.

The indignities to the human spirit and civil rights did not end with the adjudication by persons with a pecuniary interest as described in detail in Document Two attached to the unanswered Application for Leave to File Motion for the Presentation of Two Documents, dated July 24, 1978. An examination of this document will reveal that there is no seasonal time granted in which one can make objection on the basis of law to the administrative proceedings. The proceedings afford only objection on the basis of fact. One accused may ask for a hearing at which such a matter might be raised. The hearing is generally denied if one has only asked for the hearing. For those granted a hearing, matters of law such as disqualification of an adjudicator cannot be brought up. Any hearing granted is by an adjudicator in the employ of the school district whether it be the Superintendent of Schools or a hearing officer appointed by him. There is no impartial body to whom one can protest before the taking of property, namely wages. Even in those case in which a hearing has been granted, the hearing is held to determine whether wages will be restored that have been taken as indicated in §210, Subdivision 2, Paragraph (h). All of the procedures involved are in absolute violation of the principle of Sniadach v. Family Finance Corp. of Bayview (395 U.S. 337 (1969) which prohibits pre-judgment garnishment. In its decision of October 4, 1978, this Court stated the following:

"The procedure provided by N.Y. Civil Service Law

§210 does not amount to a garnishment without hearing or court order in violation of Sniadach v. Family Finance Corp.,395 U.S. 337 (1969)."

Although the thrust of this petitioner's arguments have been concerned with the unconstitutional aspects of the Taylor Law because of the pecuniary interest of the Superintendent of Schools and of the school district in the collective bargaining process and in the adjudication of employees as to guilt or innocence under the Taylor Law penalty provisions for administrative proceedings, the petitioner is quite concerned with the manner in which deductions are made from wages. The mere fact that deductions can be made in the most barbarous of fashion without regard to any humanitarian considerations as expressed in the Federal Wage Garnishment Law and New York State Garnishment laws lends support to this petitioner's contention that the garnishments are unconstitutional and illegal in the first instance. On what Constitutional basis can one support the notion that a teacher working full-time in Lakeland, New York,should receive approximately $8.00 per week in take-home pay over a period of two months? On what Constitutional basis can one support excessive garnishments of this nature which is tantamount to the government saying to the employee: "Not only will I make a slave of you while I collect your debt, but I will expect you to perform your services without the minimum ability to feed and support yourself." The evils of the Taylor Law thus do not end with an unconstitutional adjudication following affected collective bargaining. These"judicial proceedings" outside the realm of the New York State courts create their own brand of justice which bears little resemblance to the requirements of the United States Constitution and Federal and State laws in regard to due process and wage

garnishment. In Sniadach, supra, in his concuring opinion, the Honorable Justice Harlan stated at 395 U.S. 343:

> " From my standpoint I do not consider that the requirements of "notice" and "hearing" are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. Compare the majority and dissenting opinions in the Wisconsin Supreme Court, 37 Wis2d 163, 178, 154 N.W. 2d 259,267 (1967)." (Italics added)

Appellate review under Article 78 of the New York Civil Practice and Rules makes a mockery of Sniadach v. Family Finance Corp. Article 78 may allow for review, but it is after the taking and after the damage has already been done. It certainly is not clear that it would allow for review before the taking, that is, before the garnishment. This petitioner has never heard of such a pre-determination before garnishment by any regular court in regard to Taylor Law deductions. The closed-circuit procedures of the Taylor penalty provisions violate all of the precepts of "notice" and "hearing" required before garnishment. Among these violations are the following:

1. There is no notice that a hearing will be held.
2. There is no notice indicating the amount which is to be collected. One knows only after the taking.
3. There is no notice to appear before any party other than someone acting as an agent of the school district if a hearing is granted.
4. The only notice that is sent is one which only allows an employee to raise questions of fact and not of law, in letter affidavit form.
5. The notice sent does not allow an attorney to make a personal appearance (unless a hearing is

granted).

6. The request for a hearing is denied if one does not state the reasons for the request in the affidavit.

7. The hearing may be denied even if one does state the reasons that the hearing is requested.

8. There is clearly no seasonable time or place in which one can object to the fact that the Superintendent of Schools or a hired hearing officer is disqualifed to make adjudication which will lead to the garnishment of hundreds or thousands of dollars of earned wages for work performed.

9. Superintendents of schools who have a conflicting executive responsibility will make determinations that will lead to the garnishment and excessive garnishment of earned wages.

10. Hearing officers who are hired contractually will make decisions affecting the garnishment of hundreds or thousands of dollars of earned wages of New York State employees even though they themselves are not part of the judiciary of the State of New York or even employees.

Thus one evil leads to another. The wage garnishments as accomplished under the Taylor Law penalty provisions are not only in violation of the Federal Wage Garnishment Law in regard to excess garnishment, but are surely illegal and unconstitutional under Sniadach, supra. This is clearly shown by the following facts:

1. The wages earned for services performed have no stigma attached to them.

2. These wages, as property, are entitled to the full protection of law.

3. Any deductions from these wages must conform to specific laws regarding garnishment.

4. The Taylor Law penalty provision are in violation of the Federal Wage Garnishment Law since they allow for excess garnishment.

5. The Federal Wage Garnishment Law protects wages from excess garnishment because of debt.

6. The United States Tax Court has clearly called deductions under the Taylor Law an indebtedness. Tucker v. Comm. of Internal Revenue, Feb. 8, 1978, (69 T.C. No. 54) (Vol 69,Advance Sheets No. 5, page 675, at page 678.

7. The Department of Labor states in its booklet, Federal Wage Garnishment Law that it will only enforce its restriction on garnishment which has been approved by a court that issues garnishment orders.

8. The implication in the above statement is that if a garnishment has not been approved by a court of law that issues garnishment orders, it is a pre-judgment garnishment.

9. If the garnishment is a pre-judgment garnishment it is illegal and unconstitutional under Sniadach, supra.

10. Since Taylor Law garnishment have not been approved by a court of law that issues garnishment orders,they are illegal and unconstitutional.

11. Thus an illegal and unconstitutional garnishment leads to the excess deductions made under the Taylor Law wages that are entitled to the full protection of the law.

12. The simultaneous interweaving of the executive function to pay compensation for services performed with a judicial function to deduct penalties has also allowed the school district to ignore the true gross wages earned so that the Federal government has lost many thousands of dollars in income taxes and Social Security taxes.

13. Thus one unconstitutional action leads to another and one illegal action leads to yet another.

14. Men usually have a pecuniary interest when they commit illegal acts. Is it possible that government instrumentalities may be guilty of the same frailty when they commit unconstitutional acts. Tumey, supra, and Ward v. Monroeville, supra, indicated it to be so.

This Court should not condone the continuation of a law which makes a travesty of the judicial process, and in the name of the health, safety and welfare of its citizens, causes some of those citizens to not only be deprived of their constitutional rights but of their very sustenance as well by the State of New York,while performing labor services for the very same State of New York.

The petitioner respectfully requests that the United States Court of Appeals for the Second Circuit reconsider its decision of October 4, 1978.

CONCLUSION

A great and brave advocate spoke these word before a court in New York in August of 1735:

> " It is said, and insisted upon by Mr. Attorney, that government is a sacred thing; that it is to be supported and reverenced; it is government that protects our persons and estates; that prevents treasons, murders, robberies, riots, and all the train of evils that overturn kingdoms and states and ruin particular people; and if those in the administration, especially the supreme magistrates, must have all their conduct censured by private men, government cannot subsist. This is called a licentiousness not to be tolerated. It is said that it brings the rulers of the people into contempt so their authority is not regarded, and so that in the end the laws cannot be put into execution. These, I say, and such as these, are the general topics insisted on by men in power and their advocates. But I wish it might be considered at the same time how often it has happened that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men which have commonly brought them into contempt with the people. The craft and art of these men are great, and who that is the least acquainted with history or with law can be ignorant of the specious pretenses which have often been made use of by men in power to introduce arbitrary rule and destroy the liberties of a free people."

The attorney closed his plea to the jury with the following words, which express eloquently this petitioner's sentiments:

> " I am truly very unequal to such an undertaking on many accounts. And you see I labor under the weight of many years and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use in assisting to quench the flame of prosecutions ... set on foot by the government to deprive a people of the right of remonstrating and complaining ... of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration, provoke them to cry out and complain, and then make the complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind. But, to conclude, the question before the court, and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main continent of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and by an impartial and uncorrupt verdict have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right - the liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth."

The State of New York has ample Constitutional means to insure its governmental security and the welfare of its citizens. The Taylor Law penalty provisions neither serve government in a proper manner nor do they serve the people of the State of New York.

Sworn to before me this
16th day of October, 1978

David Z. Nisnewitz

DAVID Z. NISNEWITZ
NOTARY PUBLIC, State of New York
No. 24-8148040
Qualified in Kings County
Certificate filed in New York County
Term Expires March 30, 1980

Respectfully submitted,

Harvey S. Kornit

HARVEY S. KORNIT
Petitioner pro se

STATE OF NEW YORK, COUNTY OF QUEENS ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF Queens ss.: Carole Nisnewitz

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 70-25 Yellowstone Blvd., Forest Hills, New York 11375

Check Applicable Box

☒ Affidavit of Service By Mail — On October 16, 1978 deponent served the within Notice and Petition for Rehea upon Campanella, Zolotorofe & Guercio, Esqs. attorney(s) for Appellee in this action, at 980 Old Country Road, Plainview, New York 11803 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

David Z. Nisnewitz

Sworn to before me on October 16, 1978

DAVID Z. NISNEWITZ
NOTARY PUBLIC, State of New York
No. 24-8146040
Qualified in Kings County
Certificate filed in New York County
Term Expires March 30, 1980

Carole Nisnewitz

.....
The name signed must be printed beneath

Carole Nisnewitz

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Docket
~~Index~~ No. 75-7540 Year 1975

UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARVEY S. KORNIT,
Appellant,

v.

BOARD OF EDUCATION
PLAINVIEW-OLD BETHPAGE
SCHOOL DISTRICT
PLAINVIEW, NEW YORK

NOTICE AND
PETITION FOR REHEARING

HARVEY S. KORNIT
Appellant pro se

~~ATTORNEY FOR~~

Office and Post Office Address, Telephone

70-25 Yellowstone Blvd.
Forest Hills, N.Y. 11375
212-261-8578

To CAMPANELLA, ZOLOTOROFE &
GUERCIO, ESQS.
Attorney(s) for Appellee

Service of a copy of the within
is hereby admitted.
Dated,

Attorney(s) for